No. 12001

IN THE

# United States Circuit Court of Appeals

FOR THE NINTH CIRCUIT

GENERAL INSURANCE COMPANY OF AMERICA,
A Corporation, *Appellant,*

v.

HENRY O. LINK, E. W. ELLIOTT and O. L. GRIMES,
*Appellees.*

## REPLY BRIEF OF APPELLANT

UPON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

HONORABLE ROGER T. FOLEY, *Judge*

SKEEL, MCKELVY, HENKE,
EVENSON & UHLMANN
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## ARGUMENT

It is conceded by appellees in their brief that appellant is not liable as war risk insurer unless:

1. At the time of the collision in question the *Roustabout* was engaged in a warlike operation.
2. The collision was proximately caused by that warlike operation, and
3. The *Roustabout* was at least partially at fault.

Appellees contend that each of these three conditions of liability is satisfied by the facts of this case.

We submit that not one of those three conditions of liability is satisfied by the facts of this case.

### I.

### The Roustabout Was Not Engaged in a Warlike Operation

Appellees do not deny that at the time of collision the *Roustabout* was sailing under peacetime conditions: Her navigation lights were burning; she was not zigzagging; she was not sailing upon an unusual course nor at an unusual speed; she was not in convoy; she was not under naval escort, and all shore aids-to-navigation were in operation.

In support of their contention that the *Roustabout* was at the time of the collision engaged in a warlike operation appellees rely entirely upon the following:

(a) The *Roustabout* was an armed and commissioned vessel of the United States Navy manned by United States Naval personnel (Appellees' Brief 31).

(b) The *Roustabout* was engaged in shuttle service between Seattle and war bases in Southeastern Alaska (Appellees' Brief 32), and

(c) That upon her southbound voyages the *Roustabout* "would return cargo of all description, including defective ammunition, empty oil drums, empty torpedo cases, and her purpose in returning to Seattle was to reload with petroleum products and dry cargo, bombs, torpedoes, etc., for the Navy and go North again to war bases in Alaska." (Appellees' Brief 32).

The decided cases, however, make clear that neither singly nor in combination are such facts sufficient to cause a vessel to be engaged in a warlike operation.

**a. The fact that the Roustabout was an armed and commissioned vessel of the United States Navy, manned by United States Naval personnel, did not cause her to be engaged in a warlike operation.**

There have been a number of decided cases in which an armed and commissioned naval vessel has been involved in a collision during wartime. In none of those cases has it been held that the naval veseel in question was engaged in a warlike operation simply because of the fact of her being in the naval service of a sovereign power.

In *Attorney General v. Ard Coasters, Ltd.* (1921) 2 A. C. 141, the British destroyer *H.M.S. Tartar* was held to have been engaged in a warlike operation. This holding was not founded upon the fact that the *Tartar* was an armed and commissioned vessel of the British Navy, but rather upon the fact that she was at the time engaged in the clearly warlike operation of patrolling for submarines.

In *Liverpool and London War Risks Ins. Assn., Ltd., v. Marine Underwriters of S. S. Richard de Larrinaga* (1921) 2 A. C. 141, the British cruiser *H.M.S. Devonshire* was held to have been engaged in a warlike operation, not because she was an armed and commissioned vessel of the British Navy, but rather because she was at the time steaming at best speed in a blacked-out condition in order to pick up and escort a convoy to its destination.

In *Charente Steamship Co., Ltd., v. Director of Transports*, 38 T.L.R. 148, the United States naval vessel *America* was held to have been engaged in a warlike operation, not, however, because she was an armed and commissioned vessel of the United States Navy, but rather because she was at the time engaged in transporting troops to France.

In *Wynnstay S.S. Co., Ltd., v. Board of Trade*, 23 Ll. L. Rep. 278 (K. B. 1925) the United States naval

vessel *Sylvan Arrow* was held not to have been engaged in a warlike operation notwithstanding the fact that she was an armed and commissioned vessel of the United States Navy.

Likewise, in *Meseck Towing Lines v. Excess Insurance Company, et al.*, 77 F. Supp. 790 (E.D.N.Y. 1948) the *U.S.S. S. C. 1294* was held not to have been engaged in a warlike operation, notwithstanding the fact that she was an armed and commissioned vessel of the United States Navy.

In light of the foregoing decisions, and others could be cited, the fact that the *Roustabout* was an armed and commissioned naval vessel is entirely consistent with her being engaged in either a warlike or a non-warlike operation.

In this connection it is to be noted that in each of the following collision cases one or both of the colliding ships had been requisitioned by a sovereign power:

*Larrinaga Steamship Co., Ltd., v. Regem* (1945) A. C. 246, 61 T. L. R. 241;

*Liverpool and London War Risks Assn., Ltd., v. Ocean Steamship Co., Ltd.*, (1948) A. C. 243;

*Attorney General v. Adelaide Steamship Co., Ltd.*, (1923) A. S. 292;

*Harrisons, Ltd., v. Shipping Controller* (1921) 1 K. B. 122;

*Clan Line Steamers, Ltd., v. Board of Trade*, (1929) A. C. 514.

In each of those cases the requisitioned vessel was as much subject to the command and direction of the sovereign as was any vessel in the navy of that sovereign. Yet, in not one of those cases did the court allude to that fact as tending to establish that the vessel was engaged in a warlike operation. Each court tacitly recognized that a requisitioned vessel may as well be engaged in a non-warlike operation as in a warlike operation.

The principle is well established that the character of a vessel does not determine the character of its operation. The fact that the *Roustabout* was an armed and commissioned vessel of the United States Navy does not in consequence even tend to establish that she was engaged in a warlike operation at the time of collision.

**b. The fact that the Roustabout was engaged in shuttle service between Seattle and war bases in Southeastern Alaska did not cause her to be engaged in a warlike operation when returning from Alaska to Seattle in ballast.**

Appellees place great reliance upon the fact that the *Roustabout* was engaged in a shuttle service between Seattle and Alaska as establishing that she was engaged in a warlike operation when proceeding in ballast from Alaska to Seattle. The argument of appellees

is that, since the carriage of petroleum products from Seattle for the use of boats and planes in Southeastern Alaska was a warlike operation, the return voyage was likewise a warlike operation.

It might just as well be argued, however, that, since a voyage in ballast from Southeastern Alaska to Seattle is clearly non-warlike, a voyage from Seattle to Alaska is likewise non-warlike. This latter argument is without merit but it points up the fallacy of attempting to ascribe to a "round voyage" the character of one of the legs of that voyage.

As pointed out in appellant's opening brief, in *Larrinaga Steamship Co., Ltd., v. Regem* (1945) A. C. 246, 61 T. L. R. 241, a recent case arising out of World War II, the House of Lords was faced with the precise problem before this court of characterizing one leg of a "round voyage." (Appellant's opening brief 32). In that case the House of Lords was unequivocal in holding that the whole of a "round voyage" is not characterized by the warlike character of one leg of that voyage.

Appellees have seen fit in their brief to ignore completely this decision of the House of Lords. That decision, however, cannot so easily be brushed aside. It is in this case precisely in point; and it is precisely contrary to the position taken by appellees. The clear

holding of *Larrinaga Steamship Co., Ltd., v. Regem* is that a "round voyage" is not to be characterized by one leg of that voyage but rather that the character of each leg of the voyage is to be determined upon its own facts.

That decision demands that in the present case the warlike or non-warlike character of the *Roustabout's* voyage from Alaska to Seattle be determined upon the facts of that voyage alone without reference to the character of any voyage which may have preceded it or which may have followed it.

Upon the authority of that case this court cannot, we respectfully submit, look beyond the particular voyage from Southeastern Alaska to Seattle upon which the *Roustabout* was engaged at the time of her collision with the *Eastern Prince*. If that single southbound voyage was in and of itself a warlike operation, the *Roustabout* was engaged in such an operation. If that voyage was in and of itself not a warlike operation, then the *Roustabout* was not engaged in a warlike operation at the time of the collision.

**c. The fact that the Roustabout customarily carried miscellaneous dry cargo upon her southbound voyages cannot characterize the voyage in question as a warlike operation.**

It is uncontroverted that at the time of the collision

the *Roustabout* was an armed and commissioned and naval vessel; that she was proceeding in ballast; that her navigation lights were burning; that she was not zigzagging; that she was not sailing upon an unusual course or at an unusual sped; that she was not in convoy or under escort; that she was returning to Seattle after having carried petroleum products to bases in Southeastern Alaska; and that all shore aids-to-navigation were in operation.

Upon those facts without more, the *Roustabout* was clearly not engaged in a warlike operation. As has already been shown, neither the fact that she was a naval vessel nor the fact that she was returning from a voyage to a war base, has the effect of characterizing her return voyage as a warlike operation.

In order to sustain their position, appellees must point out facts additional to those conceded. The sole additional fact to which they point is that "southbound she would return cargo of all descriptions, including defective ammunition, empty oil drums, empty torpedo cases," (Appellees' Brief 32). At one time or another the *Roustabout* may have carried defective ammunition and empty torpedo cases southward from Alaska. What she may have carried at one time or another, however, is without significance as regards the voyage in question. Only the character of the cargo

which she was at the time actually carrying is significant in characterizing that voyage. As to the character of that cargo, only one thing is certain—it was almost entirely salt water, carried as ballast.

As to the character of the dry cargo, if any, actually aboard the *Roustabout* at the time, the record is bare. There is testimony as to what it might have been, but not one word as to what it actually was.

The court found that upon her southbound voyages the *Roustabout* carried "empty containers, oil drums, empty acetylene and oxygen tanks, damaged airplane motors, damaged airplanes, trucks and automobiles." (Ap. 48). In the absence of direct evidence to the contrary, it is but conjectural to assume that at the time of collision the *Roustabout* was carrying anything more warlike than empty containers and oil drums.

The carriage of such cargo is certainly a non-warlike operation if the carriage of a cargo 16 per cent of which was for the military authorities was non-warlike:

> *Clan Line Steamers, Ltd., v. Board of Trade,* (1929) A. C. 514;

if the carriage of iron ore was non-warlike:

> *Britain Steamship Company, Ltd., v. The King,* (1921) 1 A. C. 99;

if the carriage of steel rounds to be used in the manufacture of shells for the French Army was non-warlike:

> *Clan Line Steamers, Ltd., v. Liverpool & London Insurance Assn.*, (1943) 1 K. B. 209, 58 T. L. R. 369;

and if the carriage of raw material for the manufacture of smokeless powder was non-warlike:

> *Nordling v. Gibbon*, 62 F. Supp. 932 (1945 S. D. N. Y.).

Appellees argue that it is immaterial what the *Roustabout* was carrying or in which direction she was going (Appellees' Brief 40).

It is true, in general, that the cargo or direction of voyage of a *warship* may be immaterial as regards the character of its operation. A warship, almost by definition, enters upon a warlike operation when it enters upon the duties for which it was designed. For example, the British destroyer *Tartar* (Appellees' Brief 40) was obviously upon a warlike operation when it was patrolling for submarines. So also was the British cruiser *Devonsire* when it was proceeding at best speed in a blacked-out condition in order to pick up and escort a convoy to its destination.

The immateriality of cargo or direction of voyage as regards a *warship* cannot, however, be carried over to

vessels which are not warships. For example, the *Warilda* decision (Appellees' Brief 40) rested upon the fact that the *Warilda* was at the time carrying over 600 doctors and wounded men from the battlefields of France. The *Roanoke* decision (Appellees' Brief 40) was based upon the fact that not only was she a warship but she was carrying over seven hundred live mines.

A warship becomes warlike merely by engaging in the duties for which she was designed. A cargo vessel, on the other hand, not being inherently warlike, becomes so by virtue of the cargo she carries, and this is true, as has been shown, whether she be a merchantman or a naval vessel. When she carries steel rounds for the manufacture of shells or raw materials for the manufacture of smokeless powder, she is upon a non-warlike operation.

> *Clan Line Steamers, Ltd., v. Liverpool & London Insurance Assn.*, (1943) 1 K. B. 209, 58 T. L. R. 369;
>
> *Nordling v. Gibbon*, 62 F. Supp. 932 (1945 S. D. N. Y.).

When that same vessel carries ammunition or airplanes or tanks, she is upon a warlike operation.

Despite the argument of appellees to the contrary (Appllees' Brief 40) it is clear that the character of a cargo vessel's operation can be determined only by

reference to her cargo. Her holds may be filled with oats—or they may be filled with bombs. In the case of the *Roustabout,* her holds were filled with sea water, the least warlike of cargoes. We submit that the character of the voyage of the *Roustabout,* in common with all cargo ships, must partake of the character of that sea water.

## II.

### The Collision Was Not Proximately Caused by a Warlike Operation

In their brief, appellees concede that a loss is a war risk loss only if it is proximately caused by a warlike operation. They cite various definitions of "proximate cause." (Appellees' Brief 25-30). Those definitions are in general agreement that the proximate cause of a loss is the "efficient cause" of that loss. (Appellees' Brief 28).

If that definition of proximate cause is applied to the facts of this case, it is apparent that the alleged warlike operation of the *Roustabout* was not the efficient cause of the collision.

If the *Roustabout* were, as argued by appellees, engaged in a warlike operation when proceeding southward, she was so engaged only by reason of the fact that she was carrying a warlike cargo northward or by

reason of the fact she was carrying a warlike cargo southward. Had the *Roustabout* carried *no* cargo northward and was carrying no cargo southward, she would have been no better able to avoid a collision with the *Eastern Prince.* In other words, the character of her cargo, the only factor which could possibly have characterized the *Roustabout's* operations as warlike, did in no respect contribute to the accident.

Can it be said then that the *efficient* cause of the collision was the alleged warlike operation upon which the *Roustabout* was engaged? The American decisions are unanimous in holding that it cannot.

> *Queen Insurance Company v. Globe & Rutgers Fire Insurance Co.*, 263 U. S. 487, 68 L. ed. 402 (1923);
>
> *Standard Oil Co. v. St. Paul Fire and Marine Insurance*, 59 F. Supp. 470 (S. D. N. Y. 1945);
>
> *Ferro v. United States Mail Lines and United States of America*, 74 F. Supp. 250 (S. D. N. Y. 1947);
>
> *Daronowich v. United States of America*, 73 F. Supp. 1004 (S. D. N. Y. 1947);
>
> *Meseck Towing Lines v. Excess Insurance Company, et al.*, 77 F. Supp. 790 (E. D. N. Y. 1948).

The English cases, we submit, are in accord. In *Yorkshire Dale Steamship Co., Ltd., v. Minister of War Transport,* (1942) A. C. 691, 58 T. L. R. 263, the case

much relied upon by appellees (Appellees Brief 12-16), the *Coxwald* was stranded while proceeding in convoy to Norway with petrol for the British Forces there. Appellees argue that this case stands for the principle that any collision loss sustained in a warlike operation is proximately caused by that operation (Appellees' Brief 13-16).

We do not so read that decision. The Lord Chancellor expressly stated at 58 T. L. R. 264:

> "Authority is hardly needed for the proposition that you do not prove that an accident is 'the consequence of' a warlike operation merely by showing that it happened 'during' a warlike operation."

Lord MacMillan stated at 58 T. L. R. 266:

> ". . . to place liability on the Minister it is not enough that the casualty arose in the course of a warlike operation."

How then did the House of Lords find that the loss sustained by the *Coxwald* was proximately caused by her warlike operation?

The facts of that case were that the *Coxwald* was in convoy, that the convoy was zigzagging, that prior to the stranding the convoy had made an alteration of course to starboard in order to avoid what was thought to be an enemy submarine, and that finally the strand-

ing would not have occurred had the alteration in course not been made.

Upon those facts the Lord Chancellor was able to say at 58 T. L. R. 265:

> ". . . In the present case, where the finding is that so substantial a deviation from the normal course was ordered for the express purpose of avoiding an enemy submarine, and was not subsequently corrected, there is no reason for saying that the arbitrator, in finding that the loss was the direct consequence of a warlike operation, was disregarding what had been already laid down by this House."

Lord MacMillan said at 58 T. L. R. 266:

> "Certainly the vessel would not have gone ashore where she did but for the order which she received and obeyed to change her course to the eastward to avoid apprehended enemy action."

Lord Porter said at 58 T. L. R. 270:

> "One must, I think, take the whole story—a ship sailing on a warlike operation at speed in dangerous waters where unexpected currents might be found, in convoy without lights following an ordered course and deviating from it again under orders for the purpose of avoiding actual or imagined submarine attack. I do not think that any one of these factors can be neglected in arriving at the cause of the loss."

One may search the "whole story" of the *Roustabout* in vain for such factors connecting the loss in question with the warlike operation upon which the *Roustabout*

was allegedly engaged. In the absence of such factors, we submit that the *Coxwald* decision is inapplicable and that the alleged warlike operation of the *Roustabout* was not the proximate cause of the loss sustained by the *Eastern Prince.*

## III.

### The Roustabout Was in No Way at Fault.

We shall answer in order the arguments of the appellees as regards the fault of the *Roustabout.*

**a. The Roustabout was not at fault for violation of the Narrow Channel Rule.**

In order to attribute fault to the *Roustabout* appellees have deemed it sufficient:

1. To establish that the site of collision was within a Narrow Channel.

2. To quote the Narrow Channel Rule and

3. To establish that the *Roustabout* was not proceeding to her starboard of the mid-channel.

Appellant concedes each of these three facts and yet denies that the *Roustabout* was thereby at fault.

The Narrow Channel Rule provides as follows:

> "In narrow channels every steam vessel shall, when it is safe and practicable, keep to that side of

> the fairway or mid-channel which lies on the starboard side of such vessel." International Rules Article 25, 33 U. S. C. A. Sec. 110.

It is perfectly obvious that the Narrow Channel Rule was designed to avoid collisions only as between vessels approaching each other. By requiring that each vessel keep to its starboard of the mid-channel this rule has the same effect as a center line upon a highway.

The rule in no way tends to lessen the risk of collision between vessels proceeding in the same direction. As regards such vessels, the rule confines their navigation to the same side of the mid-channel line and thereby actually increases, rather than decreases, the risk of collision between them.

If one of two approaching vessels violates the Narrow Channel Rule, it is clear that that vessel is presumably at fault if the vessels collide.

> *Commonwealth and Dominion Line v. Seaboard Transp. Co.*, 258 Fed. 707 (D. C. Mass. 1919).

If each of two vessels proceeding in the same direction complies with the Narrow Channel Rule and stays to its starboard side of mid-channel, it is clear that the rule has no application to a collision between those vessels. It is demonstrable that the Narrow Channel Rule is also out of the case if each of two vessels pro-

ceeding in the same direction violates the Narrow Channel Rule.

Assume that vessel A is proceeding in a narrow channel and that vessel B is proceeding in the same channel some distance astern of A. Assume also that there are no approaching vessels and that A and B are both proceeding to the port of mid-channel. Assume further that B is overtaking A and intends to pass to the right or starboard side of A.

Under those circumstances B has the duty of keeping out of the way of A. At the same time A is under a duty to maintain her course and speed. The International Rules of the Road Article 21, 33 U. S. C. A. Sec. 106, provides as follows:

> "Where, by any of these rules, one of two vessels is to keep out of the way, the other shall keep her course and speed."

Now, assume that A should veer off to the right, directly into the path of B, so that the latter vessel cannot avoid colliding with A. Could A, under those circumstances, invoke the Narrow Channel Rule in order to charge B with fault? We respectfully submit that A could not, for as to vessels proceeding in the same direction the risk of collision is no greater when both vessels adhere to that rule than when both vessels disregard it. It was not designed to avoid collision

between them and cannot be invoked when such a collision occurs.

The *Eastern Prince* in the case at bar is in the precise position of vessel A, for as to the *Roustabout*, it is clear that the *Eastern Prince* was an overtaken vessel. She displayed no red and green navigation lights to indicate her true character as an approaching vessel (Ap. 113). The court so found (Ap. 49) and the appellees do not challenge that finding.

To the *Roustabout* the *Eastern Prince* represented: "I am proceeding in the same direction that you are. I am not an approaching vessel, so you may safely disregard the Narrow Channel Rule." In reliance upon that representation, the *Roustabout* did disregard the Rule. Now, after luring the *Roustabout* into that reliance, the *Eastern Prince* cannot be permitted to reveal her true identity and then say to the *Roustabout* immediately prior to the collision: "I wasn't an overtaken vessel after all. I'm an approaching vessel and you are at fault for being to the port of mid-channel."

Appellees argue that if this was in fact an "overtaking situation," the *Roustabout* was "guilty of a plain statutory fault" since she obviously failed to keep out of the way of the *Eastern Prince*. (Appellees' Brief 56).

That argument is, of course, not tenable. The duty

of the overtaking vessel is in reality not an absolute duty to avoid the overtaken vessel. For example, in *The Helen*, 204 Fed. 653 (D. C. N. J. 1913) the overtaking vessel was held blameless when the overtaken vessel stopped so suddenly that collision was unavoidable.

The duty of the overtaking vessel is rather a duty to take seasonable steps to avoid the overtaken vessel and she is not at fault unless she was guilty of some negligence or want of care.

> *The Grace Girdler*, 7 Wall. 196, 19 L.ed. 113 (1868)

In the case at bar the *Roustabout* did take the requisite seasonable steps to avoid the *Eastern Prince*. Captain Parks of the *Roustabout* testified as follows: (Ap. 113)

Q. Then as you continued to approach the *Eastern Prince*, what opinion did you form as to the directon in which she was going?

A. I thought she was going in the same direction we were.

Q. In other words, you assumed that you were actually overtaking the *Eastern Prince?*

A. That is right.

Q. Counsel has referred to the change that you made in your course. Can you explain the nature of that change?

A. As we got closer to the other vessel, which later developed to be the *Eastern Prince*, the angle of the other vessel—the angle of the bow was closer; we were getting closer to it. So I hauled the *Roustabout* a little further to the left, still thinking we were overtaking it and passing too close to it.

Q. So that you turned your vessel in towards the left or portside with the thought of allowing additional space as you passed the vessel that you thought you were overtaking?

A. That is correct.

Q. During this entire period were you continuing to observe the *Eastern Prince?*

A. Yes, sir.

Had the *Eastern Prince* been what she purported to be, there would clearly have been no collision. Since she was not what she purported to be, she cannot invoke the Narrow Channel Rule in order to ascribe fault to the *Roustabout.*

**b. The Roustabout was not at fault for failing to indicate a change of course by whistle signal.**

It is true that Article 28 of the International Rules of the Road provides as follows:

> ". . . When vessels are in sight of one another, a steam vessel under way, in taking any course authorized or required by these rules, shall indicate that course by the following signals on her whistle or siren, namely:
>
> . . . Two short blasts to mean, 'I am directing my course to port.' . . ." (33 U. S. C. A. Sec. 113)

After the *Eastern Prince* exposed her red light, the *Roustabout* made a change of course but did not sound a whistle signal. There are two reasons why the *Roustabout* was not at fault in failing to sound that signal.

In the first place when the *Eastern Prince* suddenly shed its character as a southbound vessel, the captain of the *Roustabout* found his vessel placed in a position of extreme peril. The captain testified as follows (Ap. 114):

Q. During this entire period were you continuing to observe the *Eastern Prince?*

A. Yes, sir.

Q. When did you first become conscious of the fact that you were not overtaking the *Eastern Prince* in the sense that the vessel was going the same direction that you were and that you were overtaking it from the rear?

A. We were getting very close together and I believe the *Eastern Prince* hauled hard right. When they did so, I saw their red light then and I hauled the *Roustabout* hard left and went full astern.

Appellees do not contend that the emergency orders of "hard left" and "full astern" were improper. They contend that the captain should have in addition sounded a whistle signal to indicate his change in course.

It is well established that mistakes are excused if committed in moments of sudden peril and excitement

caused by the misconduct of another vessel. In *The Lafayette* (C. C. A. 2d 1920) 269 Fed. 917 at 925, the court said:

> "... if one vessel places another in a position of extreme danger by wrongful navigation, the other ship is not to be held to blame if she does something wrong and is not navigated with perfect skill and presence of mind."

In *The S.S. Bylayl*, 49 F. Supp. 439 (S. D. N. Y. 1943), it was held that this *in extremis* rule applies to the failure to sound a whistle signal. At 49 F. Supp. 443 the court said:

> "That the *Bylayl* did not blow a signal when she went 'hard left' and continued on at full speed in an effort to avoid the *Vacuum* should not condemn her. She was confronted with a sudden critical situation, and if those in charge of her navigation committed an error, it was only some thirty seconds before the collision and was a situation *in extremis* ..."

If the failure to signal the course change was a mistake, we submit that it was clearly excused by the fact that the *Eastern Prince* had placed the *Roustabout* in a position of extreme peril.

The failure to sound a signal was moreover excused by the fact that it in no way contributed to the collision.

Captain Rose of the *Eastern Prince* testified as follows (Ap. 203):

Q. (By Mr. Henke): When you first sighted the *Roustabout*, where was it in relation to your vessel?

A. Well, he was three miles or more away northward in the channel. I was going north and he was coming south. I was bucking a flood tide; he was coming with the flood tide. He was coming very rapidly. I was moving over the ground very slowly. We were both on the right-hand side of the channel. When I saw him, I expected that he would go to his right, which he did not do.

Q. What direction was his vessel moving in relation to yours?

A. Well, I should say he was about three or four points off my bow, coming toward me.

Mr. Long: Which bow, port or starboard?

The Witness: Port—the left-hand side of the ship.

Q. (By Mr. Henke): You took what action then; what did you do then?

A. Then I proceeded on my course, and when I saw that his lights had changed their range and if he continued on that course that he would jeopardize me, I turned to the right.

Q. You turned to the right. What did you do after you turned to the right?

A. I opened up his port light, shut out his green light, I steadied my ship and proceeded north on my course of 312 degrees.

Q. I believe you gave a whistle signal at that time?

A. No.

Q. No?

A. Then his green light came into view again which meant danger for me. Then I told my Quartermaster, "Put the wheel hard a'port," and at the same time I reached up and blew one blast of the whistle.

The testimony of Captain Parks of the *Roustabout* was as follows (Ap. 114):

Q. When did you first become conscious of the fact that you were not overtaking the *Eastern Prince* in the sense that the vessel was going the same direction that you were, and that you were overtaking it from the rear?

A. We were getting very close together and I believe the *Eastern Prince* hauled hard right. When they did so, I saw their red light then and I hauled the *Roustabout* hard left and went full astern.

From the foregoing testimony it becomes apparent that when the *Roustabout* was first able to see the red light of the *Eastern Prince* the latter was swinging to the right by reason of the "hard a'port" order of her captain. Now, had the captain of the *Roustabout* sounded his whistle at that time, the captain of the *Eastern Prince* could not thereby have been able to avert the impending collision. He could not have shifted

his rudder to "hard left," for that would have taken the *Eastern Prince* toward rather than away from the *Roustabout.* He could not have turned more sharply away from the *Roustabout,* for his rudder was already at its extreme right position. As a matter of fact, at the time he gave the order "hard a'port," the captain of the *Eastern Prince* had already decided that a collision was inevitable and had decided to take the impact upon the stern of the *Eastern Prince* (Ap. 158). Certainly, under those circumstances, it cannot be urged that the failure by the *Roustabout* to signal its emergency change of course could have been a cause of the collision.

**c. The Roustabout was not at fault for failure to keep a proper lookout.**

The sole fault of the lookout, if any, was his failure to report the red light of the *Eastern Prince.* Since the captain of the *Roustabout* became aware of that red light at the same time that the lookout did, the failure by the lookout to report that light could not, of course, have been a cause of the collision. Appellant is content to rest upon its opening brief to refute the contention by appellees that this failure by the lookout contributed in any way to the collision of the *Roustabout* and *Eastern Prince.* (Appellant's Opening Brief 52-54).

## CONCLUSION

It is respectfully submitted that the decree of the trial court should be reversed.

Respectfully submitted,

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